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JASON EDWARD THOMAS CARDIFF

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JASON EDWARD THOMAS CARDIFF,

Defendant.

Case No. 5:23-cr-00021-JGB

**JASON CARDIFF'S *EX PARTE*
APPLICATION FOR AN ORDER
TRANSFERRING CASE TO THE
HONORABLE DOLLY M. GEE;
MEMORANDUM OF POINTS AND
AUTHORITIES**

*[Filed concurrently with Request for
Judicial Notice; Declaration of Stephen
G. Larson; and [Proposed] Order]*

1 Defendant Jason Edward Thomas Cardiff, by and through his counsel of
2 record, hereby applies to the court *ex parte* for an order transferring the instant
3 criminal action to the Honorable Dolly M. Gee.

4 Judge Gee presided over *FTC v. Jason Cardiff et al.*, Case No. 5:18-CV-
5 02104-DMG (“FTC Action”), which is inextricably intertwined with the current
6 indictment against Mr. Cardiff which has been assigned to this Court. Although the
7 two cases do not fall squarely within the parameters of General Order No. 23-15,
8 § II.I.1 (the “General Order”) because this is a criminal matter and the FTC Action
9 was a civil matter, Mr. Cardiff respectfully believes that the Court should exercise
10 its discretion to transfer this case to Judge Gee because the government’s conduct in
11 the FTC Action may be relevant to Mr. Cardiff’s defenses and because transferring
12 this matter to Judge Gee is in the interest of judicial economy.

13 Moreover, *ex parte* relief is appropriate because (1) a properly noticed motion
14 to transfer the instant matter to Judge Gee would not be heard until January 22,
15 2024, the day before trial is currently set to begin; and (2) it would not be in the
16 interest of judicial economy for the Court to conduct extensive substantive work on
17 the matter before deciding on whether to transfer the case.

18 This *ex parte* Application is based upon this Notice, the accompanying
19 Memorandum of Points and Authorities, the Request for Judicial Notice, the
20 Declaration of Stephen G. Larson, the files and records in this action, and upon such
21 oral and documentary evidence as may be allowed at any hearing on this *ex parte*
22 Application.

23 On December 14, 2023, Mr. Cardiff’s counsel met and conferred with
24 Assistant U.S. Attorney Valerie Makarewicz who advised that the government was
25 still formulating its position. (Larson Decl., ¶ 3.) On December 21 and 22, 2023,
26 Mr. Cardiff’s counsel left two voicemails with Ms. Makarewicz requesting an
27 update on the government’s position on transferring this case to Judge Gee. Ms.
28

1 Makarewicz responded by email that the government opposes Mr. Cardiff's request
2 to transfer this case to the Honorable Dolly M. Gee. (Larson Decl., ¶¶ 4-5.)

4 | Dated: December 22, 2023

LARSON LLP

By: /s/ Stephen G. Larson

Stephen G. Larson
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Jonathan Gershon

Attorneys for Defendant
JASON EDWARD THOMAS CARDIFF

1 **I. INTRODUCTION**

2 The instant criminal indictment appears to stem from dual civil and criminal
 3 investigations by the government—the former by the Federal Trade Commission
 4 (“FTC”) and the latter by the United States Postal Inspection Service (“USPIS”)—
 5 into Jason Cardiff and one of his companies, Redwood Scientific Technologies, Inc.
 6 (“Redwood”).

7 On October 10, 2018, the FTC filed a civil complaint against Mr. Cardiff in
 8 his role as President and CEO of Redwood Scientific Technologies, Inc.,
 9 (“Redwood”) entitled *FTC v. Jason Cardiff, et al.*, Case No. 5:18-CV-02104-DMG
 10 (“FTC Action”). The FTC Action alleged, among other things, that Mr. Cardiff
 11 enrolled Redwood customers into autoship programs and charged their credit cards
 12 without their permission. The Honorable Dolly M. Gee presided over the FTC
 13 Action, which spanned over three and a half years. On March 1, 2022, Judge Gee
 14 entered a permanent injunction against Mr. Cardiff and Redwood but permitted
 15 continued operation of the business under prescribed circumstances and declined to
 16 impose any monetary remedies.

17 On a date unknown, USPIS initiated a criminal investigation against Mr.
 18 Cardiff based on the very same facts as the FTC Action.¹ Counsel for the
 19 government, Assistant U.S. Attorney Valerie Makarewicz, has represented that
 20 much of the discovery being produced on hard drives comes from the FTC case.
 21 That investigation led to a criminal indictment against Mr. Cardiff which was filed
 22 on January 31, 2023, and unsealed on November 27, 2023.

23 Although the two closely related cases do not fall squarely within the
 24 parameters of General Order No. 23-15, § II.I.1 (the “General Order”) strictly
 25

26 ¹ Mr. Cardiff, through the undersigned, made an informal discovery request seeking
 27 the date that the government initiated the criminal investigation but, thus far, the
 28 government has refused to provide this date. Instead, Mr. Cardiff will now have to
 scour terabytes of data attempting to ascertain this critical data point.

1 because this is a criminal matter and the FTC Action was a civil matter, Mr. Cardiff
2 respectfully believes that the Court should exercise its discretion to transfer this case
3 to Judge Gee for several reasons.

4 ***First***, in the Permanent Injunction, Judge Gee—apparently never having been
5 made aware of the government’s criminal investigation—ordered Mr. Cardiff to
6 destroy a substantial amount of evidence from the FTC Action, including large
7 amounts of customer information. To supervise this and other aspects of the detailed
8 injunction, Judge Gee expressly retained continuing jurisdiction over the FTC
9 Action. Given Judge Gee’s ongoing involvement in the related civil matter, Mr.
10 Cardiff respectfully submits that it is appropriate for Judge Gee to consider the
11 implications that her Permanent Injunction and related orders may have had and
12 may continue to have on Mr. Cardiff’s criminal case.

13 ***Second***, Judge Gee appointed a Receiver in the FTC Action who seized
14 control of Mr. Cardiff’s companies, including Redwood. On September 20, 2022,
15 just four months before the return of the criminal indictment, Judge Gee authorized
16 the Receiver to immediately destroy records and computers which contained
17 consumer information which is evidence directly relevant to the charges brought in
18 this matter. If the government initiated its criminal investigation prior to September
19 20, 2022—which the defense has reason to believe is the case, but which the
20 government presently refuses to acknowledge one way or the other—then the
21 government’s failure to object to the destruction of this crucial evidence may be
22 grounds for seeking dismissal of the indictment. Again, since any obligation of the
23 government to disclose its investigation would have been owed to Judge Gee, Mr.
24 Cardiff respectfully submits that it is appropriate for Judge Gee to be assigned the
25 criminal case.

26 ***Third***, to the extent that the government shared information gathered through
27 discovery in the FTC Action with its USPIS criminal investigators and/or federal
28 prosecutors, either directly or through the court-appointed Receiver, the government

1 may have violated the Protective Order entered in the FTC Action as well as Mr.
2 Cardiff's constitutional rights. The Protective Order generally prohibited the Parties
3 from disclosing confidential, proprietary, or private information, and thus whether
4 the government violated Judge Gee's Protective Order should be determined by
5 Judge Gee who retained jurisdiction to enforce that order. Moreover, if the
6 government acted in bad faith during the FTC Action by seeking compelled
7 discovery from Mr. Cardiff and sharing that evidence with the federal criminal
8 investigators and/or prosecutors—again, either directly or through the court-
9 appointed Receiver—that would violate Mr. Cardiff's constitutional rights. Because
10 the Protective Order was issued by Judge Gee, Mr. Cardiff respectfully submits that
11 it is appropriate for Judge Gee to consider any motion brought pursuant to that
12 Protective Order.

13 ***Finally***, the FTC Action and the indictment against Mr. Cardiff are
14 inextricably intertwined, and thus transferring this matter to Judge Gee is in the
15 interest of judicial economy. As with the FTC Action, two counts in the indictment
16 are based on allegations that Mr. Cardiff enrolled customers in autoship programs
17 and charged their credit cards without their permission, and two other counts allege
18 that Mr. Cardiff engaged in evidence tampering during the FTC Action. Because
19 Judge Gee is familiar with the facts, evidence, witnesses, and parties, transferring
20 this case to her would avoid unnecessary and duplicative effort. Indeed, it would
21 cause a significant burden on this Court to have to familiarize itself with the FTC
22 Action, which involved 721 docket entries and, according to the government,
23 terabytes of discovery.

24 Accordingly, given the significant overlap between the indictment and the
25 FTC Action, and the impact that this may have on Mr. Cardiff's defenses, Mr.
26 Cardiff respectfully believes that the Court should exercise its discretion to transfer
27 this case to Judge Gee.

1 **II. PROCEDURAL BACKGROUND**

2 On October 10, 2018, the government initiated the FTC Action against Mr.
 3 Cardiff in his role as President and CEO of Redwood, based on Redwood's
 4 marketing and sale of homeopathic dissolvable thin-film strips. Request for Judicial
 5 Notice ("RJN"), Ex. 1. Judge Gee presided over the FTC Action, and it spanned
 6 over three and a half years and involved 721 docket entries.

7 On September 24, 2019, the Court in the FTC Action entered a stipulated
 8 protective order which prohibited the disclosure of confidential, proprietary, or
 9 private information unless otherwise required or authorized by law. *See* RJN, Ex. 2.

10 During the FTC Action, Judge Gee appointed a Receiver who seized control
 11 of Mr. Cardiff's companies, including Redwood. On March 1, 2022, Judge Gee
 12 entered a "Final Judgment including Permanent Injunction as to Defendants Jason
 13 Cardiff and Eunjung Cardiff" in the FTC Action which specifically provided that
 14 "this Court retains jurisdiction of this matter for purposes of construction,
 15 modification, and enforcement of this Order." RJN, Ex. 3 at § XXIV. The Order
 16 further enjoined the Receiver from returning any customer information to Mr.
 17 Cardiff and ordered Mr. Cardiff to destroy any customer information in his
 18 possession. *Id.* at § XVIII(A)(2) and (B).

19 Following the entry of the permanent injunction, on September 30, 2022,
 20 Judge Gee entered an "Order approving the Receiver's Final Report and
 21 Accounting, and the Receiver's Final Fee Application." RJN, Ex. 4. This Order
 22 provided that "[t]he Receiver is authorized to immediately destroy the remaining
 23 records and computers of the Receivership Defendants, which records contain
 24 consumer information[.]" *Id.* at 3, ¶ 7.

25 On January 31, 2023, the indictment was filed in the instant matter, arising
 26 out of the same set of facts in the FTC Action—Redwood's marketing and sale of
 27 homeopathic dissolvable thin-film strips. [ECF Nos. 1-2]. Counts 3 and 4 in the
 28 indictment are premised on alleged witness and evidence tampering occurring

1 during Mr. Cardiff's defense against related allegations in the FTC Action.
2 [ECF No. 1, ¶¶ 5-6].

3 The indictment was unsealed on November 27, 2023, and Mr. Cardiff was
4 arraigned on that same date. [ECF Nos. 7, 11].

5 **III. EX PARTE RELIEF IS WARRANTED**

6 Pursuant to the Court's Standing Order, and L.R. 6-1, a properly noticed
7 motion to transfer the instant matter to Judge Gee would not be heard until January
8 22, 2024, the day before trial is currently set to begin. Moreover, given that Mr.
9 Cardiff is requesting a transfer, in part, based on judicial economy, *ex parte* relief is
10 appropriate so that the Court may decide on whether to transfer the case before
11 conducting extensive substantive work on the matter.

12 **IV. ARGUMENT**

13 It is inarguable that the FTC Action and the instant criminal action are
14 inextricably intertwined. The FTC Action involved allegations that Mr. Cardiff's
15 businesses, including Redwood, sold homeopathic dissolvable thin-film strips and
16 that in doing so, they enrolled their customers in unauthorized autoship programs
17 which resulted in the customers being charged for additional shipments. RJD, Ex. 1
18 at ¶ 7. Counts 1 and 2 in the indictment allege that the credit card charges from
19 these alleged unauthorized autoship programs constitute access device fraud under
20 18 U.S.C. § 1029(a)(5) and aggravated identity theft under 18 U.S.C. §§
21 1028A(a)(1), 2. Moreover, Counts 3 and 4 of the indictment are premised on Mr.
22 Cardiff's alleged evidence tampering in the FTC Action.

23 Given the significant overlap between the indictment and the FTC Action,
24 Mr. Cardiff respectfully believes that the Court should exercise its discretion to
25 transfer this case to Judge Gee because the FTC Action may be relevant to Mr.
26 Cardiff's defenses and because such a transfer promotes judicial economy.

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28

1 **A. The FTC Action May Be Relevant to Mr. Cardiff's Defenses**

2 Two orders made by Judge Gee in the FTC Action may have had a direct
 3 impact on potentially exculpatory evidence in this case. On March 1, 2022, Judge
 4 Gee entered a “Final Judgment including Permanent Injunction as to Defendants
 5 Jason Cardiff and Eunjung Cardiff” in the FTC Action which ordered Mr. Cardiff to
 6 destroy customer information in his possession, custody, or control within 30 days
 7 of the entry of the order” and prohibited the Receiver from returning any customer
 8 information to Mr. Cardiff. RJN, Ex. 3 at § XVIII(A)(2) and (B). Notably, Judge
 9 Gee specifically retained continuing jurisdiction over this order. *See* RJN, Ex. 3 at
 10 § XXIV (“[T]his Court retains jurisdiction of this matter for purposes of
 11 construction, modification, and enforcement of this Order.”). Then, on September
 12 30, 2022, Judge Gee entered an Order which provided that “[t]he Receiver is
 13 authorized to immediately destroy the remaining records and computers of the
 14 Receivership Defendants, which records contain consumer information[.]” RJN, Ex.
 15 4 at ¶ 7.

16 Accordingly, these two orders both directed Mr. Cardiff to destroy evidence
 17 and not only prohibited the Receiver from providing evidence to Mr. Cardiff but
 18 authorized the Receiver to destroy this evidence. If the government had already
 19 initiated its criminal investigation at the time that this evidence was allowed to be
 20 destroyed, this may be grounds for seeking dismissal of the indictment. *See, e.g.*,
 21 *United States v. Robertson*, 895 F.3d 1206, 1211 (9th Cir. 2018) (“The
 22 government’s failure to preserve potentially exculpatory evidence rises to the level
 23 of a due process violation … if the defendant shows that the government acted in
 24 bad faith.”) (citing *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988)).

25 Moreover, to the extent that the government shared information gathered
 26 through compelled discovery in the FTC Action with federal criminal investigators
 27 and/or prosecutors, the government may have violated the Protective Order that was
 28 entered in the FTC Action as well as Mr. Cardiff’s constitutional rights.

1 First, the Protective Order in this case generally prohibited the Parties from
2 disclosing confidential, proprietary, or private information, and it is not clear that
3 the government will be able to establish that an exception to this prohibition applies.
4 *See RJN, Ex. 2.* Whether the government violated the Protective Order should be
5 determined by Judge Gee, who retains jurisdiction to enforce the order. *See Beebe*
6 *v. Nutribullet, L.L.C.*, 2019 WL 4261876, at 8 (C.D. Cal. July 3, 2019) (“[T]he court
7 that issues a protective order retains jurisdiction to enforce it, even after the case has
8 closed.”).

9 Second, it is well-established law that the government may only conduct
10 parallel civil and criminal investigations of a defendant without violating their
11 constitutional rights if the government does not act in bad faith. *See e.g. United*
12 *States v. Stringer*, 535 F.3d 929, 936 (9th Cir. 2008). Such bad faith may be
13 established where “(1) the government pursued a civil action ‘solely to obtain
14 evidence for a criminal prosecution’; (2) the government ‘failed to advise the
15 defendant during the civil proceeding that it contemplate[d] his criminal
16 prosecution’; (3) ‘the defendant [wa]s without counsel’; (4) the defendant
17 ‘reasonably fear[ed] prejudice from pretrial publicity or other unfair injury’; or (5)
18 ‘other special circumstances suggest that the criminal prosecution is unconstitutional
19 or improper.’” *United States v. Asiegbu*, 2009 WL 413132, at *8 (C.D. Cal. Feb. 17,
20 2009) (citing *United States v. Kordel*, 397 U.S. 1, 12-13 (1970)). Thus, discovery in
21 this matter may reveal that the government acted in bad faith during the FTC Action
22 by engaging in dual investigations, seeking compelled discovery from Mr. Cardiff in
23 the FTC Action without disclosing the criminal investigation, and then sharing that
24 evidence with the federal criminal investigators and/or prosecutors. *See e.g. United*
25 *States v. Scrushy*, 366 F. Supp. 2d 1134, 1140 (N.D. Ala. 2005) (“Because the
26 Government manipulated the simultaneous investigations for its own purposes... the
27 court finds that the utilization of Mr. Scrushy’s deposition in this case departs from
28 the proper administration of justice.”); *United States v. Parrott*, 248 F. Supp. 196,

1 200 (D.D.C 1965) (“[T]he danger of prejudice flowing from testimony out of a
2 defendant’s mouth at a civil proceeding is even more acute when he is unaware of
3 the pending criminal charge.”).

4 Accordingly, because the government’s conduct in the FTC Action may be
5 central to Mr. Cardiff’s defense, this case should be transferred to Judge Gee who
6 presided over that case.

7 **B. The Court has Discretion to Transfer the Case In The Interest Of**
8 **Judicial Economy**

9 Under the General Order, cases may be deemed related and heard by the same
10 judge where there is (1) an underlying case arising out of the same set of facts, (2) a
11 call for determination of related or substantially similar questions of law and fact, or
12 (3) a substantial risk of duplication of labor if the matter is heard by different judges.
13 General Order No. 23-15, § II.I.1.

14 The primary purpose behind the General Order is to preserve judicial
15 economy. *See, e.g., Reno-Tahoe Specialty, Inc. v. Mungchi, Inc.*, 2018 WL
16 6267821, at *2 (C.D. Cal. Mar. 7, 2018) (“[T]he new lawsuit involves many of the
17 same parties as the previous case, and it would entail substantial duplication of labor
18 if the actions were heard by a different district judge.”); *StemCells, Inc. v.*
19 *Neuralstem, Inc.*, 2008 WL 2622831, at *4 (N.D. Cal. July 1, 2008) (“[I]t would
20 seem most conducive to judicial economy to have all of the disputes between these
21 parties decided in the same court.”); *Ross v. Chipotle Mexican Grill, Inc.*, 2016 WL
22 7634445, at *5 (S.D. Cal. Aug. 8, 2016) (noting that the “primary purpose” of
23 relating cases “is judicial economy—placing similar actions involving the same
24 plaintiff or defendant before one judge.”). Thus, while the General Order does not
25 specifically address whether this matter should be related to the FTC Action, the
26 same rationale for the General Order applies with equal force here.

27 It is indisputable that the FTC Action and the instant matter both stem from
28 Redwood’s marketing and sale of homeopathic dissolvable thin-film strips and are

1 related under the principles embodied in the General Order. There will be
2 substantial overlap in evidence, witnesses, facts, and issues presented in both
3 matters, which would result in a significant duplication of labor if the matter is
4 heard by different judges. Accordingly, judicial economy dictates that this matter be
5 transferred to Judge Gee.

6 **V. CONCLUSION**

7 For the reasons set forth above, Mr. Cardiff respectfully requests that this
8 Court transfer the instant criminal case to the Honorable Dolly M. Gee.

9
10 Dated: December 22, 2023

LARSON LLP

11
12 By: /s/ Stephen G. Larson
13 Stephen G. Larson
14 Hilary Potashner
15 Jonathan Gershon

16 Attorneys for Defendant JASON
17 EDWARD THOMAS CARDIFF

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